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October 17, 2019

U.S. Department of the Treasury
1500 Pennsylvania Avenue
NW, Washington, DC 20220

Attention: Mr. Thomas Feddo, Deputy Assistant Secretary for Investment Security

Dear Mr. Feddo:

Thank you for this opportunity to comment on the proposed regulations pertaining to certain investments in the United States by foreign persons (the "Proposed Rule") that would replace the current regulations that implement section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). We support and appreciate the efforts of the U.S. Department of the Treasury and other member agencies of The Committee on Foreign Investment in the United States ("CFIUS") to modernize CFIUS's process to better enable timely and effective reviews of certain transactions involving U.S. businesses. The comments we provide in this letter have been prepared by the Tokyo office of Shearman & Sterling LLP and reflect discussions we have had with a number of Japanese investors in U.S. businesses regarding the Proposed Rule.

The condition for a foreign entity to qualify as an "excepted investor" regarding the nationality of each member and observer of the board of directors

Under §800.220(a)(3)(iii) of the Proposed Rule, to qualify as an "excepted investor," a foreign entity must meet the condition that each member or observer of the board of directors or similar body of such entity is a U.S. national or a national of one or more excepted foreign states, and is not also a national of any foreign state that is not an excepted foreign state. This "all or nothing" requirement is inconsistent with the trend of globalization and efforts to improve corporate governance among many businesses, including leading Japanese companies; we believe the relevant language of the Proposed Rule could be revised while still protecting the interests of the U.S. people.

In 2015, the Financial Services Agency of Japan and the Tokyo Stock Exchange, Inc. published the Corporate Governance Code, as amended further in 2018. The Corporate Governance Code demands that companies listed on the Tokyo Stock Exchange appoint at least two independent directors. As a result, many Japanese companies have diversified the composition of their boards of directors by appointing independent directors who are not nationals of Japan; according to our internal survey based on publicly available Japanese annual securities reports, as of the respective latest fiscal year end of each company, there are a total of 69 non-Japanese nationals serving on the board of directors of the top 100 listed Japanese companies by consolidated revenue. This growing trend among Japanese companies of appointing non-Japanese directors also reflects the demands of an increasingly diversified and globalized shareholder base and globalized businesses. According to information available on the Japan Exchange Group website, the ownership of all stock of the companies listed on the Tokyo Stock Exchange by non-Japanese persons, including U.S. persons, is around 30% of market value and, moreover, leading global companies, including those headquartered in Japan, have built significant global consumer bases and operations including manufacturing, typically including consumers and factories in the U.S.. We believe that the diversification of the boards of directors of Japanese companies, including the recent significant increase of non-Japanese nationals serving as board members, results in a wider range of ideas and perspectives from which management can draw upon to make better informed and more global-minded business decisions, which in turn enhances corporate value benefiting all shareholders including U.S. shareholders.

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We understand that the general legislative intent of the Proposed Rule is to facilitate the protection of U.S. national security by reducing the likelihood that a foreign national of any foreign state that is not an excepted foreign state is able to access and exploit sensitive data or technology of a U.S. business while at the same time attempting to minimize any chilling effect on beneficial foreign investment. While we think that excluding such a foreign national who is the actual potential investor in the U.S. business from the "excepted investor" definition is entirely appropriate (and is clearly reflected by §800.220(a)(1) of the Proposed Rule), we think that applying the same standard to a foreign national who is the only foreign director or officer (as a potential observer of the board) of a foreign entity of an excepted foreign state that would otherwise qualify as an "excepted investor" by meeting the conditions set forth in §800.220(a)(3)(i), (ii) and (iv) of the Proposed Rule is an unnecessarily broad application in terms of achieving the legislative intent. We believe such broad application would in fact have a disproportionately chilling effect on beneficial investment in U.S. businesses by Japanese investors because, in our view, the risk that any director or officer of a Japanese company, regardless of nationality, would access and exploit data or technology of a U.S. business in a manner that would be harmful to the national security of the U.S. is extremely remote given the strict fiduciary duty imposed on directors and officers under Japanese law. Under the Companies Act of Japan (Articles 330, 335 and 402 Paragraph 3) and the Civil Code of Japan (Article 644), not only directors but also officers are subject to a well-defined and applied fiduciary duty to their company and its shareholders to act in the best interests of their company above any other interests regardless of their respective nationalities or own personal interests and therefore are not permitted to misuse or disclose material non-public technical information of any U.S. businesses obtained as directors or officers. Furthermore, the Proposed Rule, if applied as proposed, would create a strong incentive for Japanese companies to exclude non-Japanese nationals from a non-excepted foreign state in order to avoid a mandatory CFIUS filing. Such exclusion would be counter-productive and would directly contravene the globalization and diversity efforts we have witnessed lately among Japanese companies in relation to corporate governance. While we acknowledge that it is necessary to exclude a foreign entity of an excepted foreign state from qualifying as an "excepted investor" in the event that a majority or otherwise controlling number of the members of the board of directors were foreign nationals of foreign states that are not excepted foreign states to effectively prevent potential "jurisdiction shopping" tactics, we think that the Proposed Rule should account for the fact that one or some other minority of the members of a board of directors of a foreign entity of an excepted foreign state may be nationals of a foreign state that is not an excepted foreign state without resulting in any material risk of a potential threat to the national security of the U.S.

In sum, we ask CFIUS to consider amending §800.220(a)(3)(iii) of the Proposed Rule to (i) permit a foreign entity of an excepted foreign state to appoint members of its board of directors that are not U.S. nationals or foreign nationals of an excepted foreign state so long as the number of any such members does not comprise a majority of the board of directors (or, alternatively, some smaller proportion of the board of directors that may be deemed more appropriate), and (ii) not be applicable to observers of the board of directors to the extent such observers are officers of the foreign entity and are subject to fiduciary duties under the laws of the applicable "excepted foreign state" under §800.219 of the Proposed Rule or, alternatively, under laws of the applicable foreign state that are comparable to the fiduciary duties of officers in the U.S.

Thank you again for the opportunity to comment on the Proposed Rule. If you have any questions concerning the foregoing, please contact Masahisa Ikeda at +81-3-5251-1601 or Karl Pires at +81-3-5251-0203.

Very truly yours,

Shearman & Sterling LLP